THE CONSTITUTIONAL BACKGROUND OF THE RECENT JAPANESE ANTI-ALIEN LAND BILL CONTROVERSY.

THE recent contention between the Federal Government and the state of California over the anti-alien land measure raised anew the question as to the conflict of state action with treaty stipulations. It is a problem which, under our constitutional system, may arise at any time and demand an individual solution in every instance. The dilemma which has presented itself repeatedly in American history is this: the states have the reserved right to provide for their public welfare and may exercise their police powers even against a foreign country, while to the Federal Government has been delegated the exclusive jurisdiction over all international matters. Two spheres of exclusive jurisdiction overlap and the question arises: which power should predominate in such a crisis? In recognition of the recent situation it may be of some interest to review briefly the outcome of past differences relative to the same problem. Some of these cases came before the courts for adjudication, while others were disposed of by methods which may be termed domestic diplomacy.

The supremacy of federal treaty stipulations over state legislation has been settled by a long line of judicial decisions, the most significant of which will be reviewed briefly.

The first important treaty case was that of *Ware* v. *Hylton*,[1] involving the Definitive Treaty of Peace with Great Britain concluded in 1783 under the Confederation. A British subject sued a citizen of Virginia on a debt contracted prior to the war. Article IV of the treaty provided that "the creditors on either side shall meet with no lawful impediment to the recovery of debt." An existing statute of Virginia passed previous to the treaty provided for the confiscation of debts to British subjects as a war measure. This was the main point in the defense. The plaintiff replied that the statute was a "lawful impediment" and therefore annulled by the treaty. The decision reached by six of the seven justices upheld the treaty provision, and Justice IREDELL, who gave the dissenting opinion, did not base it upon any lack of power in the Federal Government to bind the states.

[1] 3 Dall. 199 (1796). In Hanenstein v. Lynham, 100 U. S. 483, (1879) and Parrott's Chinese Case, 6 Sawy. 349, a treaty was held superior to a subsequent state statute and a subsequent state constitution respectively.

The case of *Fairfax* v. *Hunter*,[2] decided in 1812, was an action in ejectment involving the construction of the treaties of 1783 and 1794 with Great Britain. In his opinion, Justice STORY declared that the defeasible title of the plaintiff alien claimed under the above treaties was confirmed and made absolute against any subsequent legislation of Virginia.

In the case of *Chirac* v. *Chirac*,[3] decided in 1817, there was called into question the validity of a law of Maryland, which contravened provisions in the Treaty of Amity and Commerce of 1778 with France, Article XI provided in substance that citizens of the United States might dispose of their property, real or personal, to any persons they wished, and that such donees, subjects of the United States, whether resident in France or elsewhere, should be allowed to take title without being obliged to obtain letters of naturalization. The subjects of the French King, resident in the United States, were to enjoy perfect reciprocity in this regard. A Frenchman who owned real estate in Maryland died intestate and his only heirs were French citizens. Maryland claimed that the property was escheatable, and according to its anti-alien laws conveyed it to a relative resident in this country. The plaintiffs, heirs of the intestate and citizens of France, brought this suit against the grantee of the state of Maryland on the ground that the treaty took precedence over the statute of Maryland. This position was sustained by the Supreme Court in the opinion rendered by Chief Justice MARSHALL. The fact that the treaty had expired was immaterial, since a right once vested does not require for its preservation the continuance of the power by which it was acquired.[4]

The case of *Geoffroy* v. *Riggs*,[5] also involved statutes of the state of Maryland. Two laws passed in 1780 and 1791 prevented citizens of France from taking property within the United States, either real or personal, by inheritance from citizens of the United States. Justice FIELD reviewed the cases upon the subject and held that the above statutes were suspended by the terms of the treaty of 1800 with France.

The decisions of greatest interest for our purposes have been rendered in cases arising from attempts of the Pacific States to

[2] Fairfax's Devisee v. Hunter's Devisee, 7 Cranch. 602 (1812).

[3] 2 Wheat. 259 (1817).

[4] The superiority of treaties to state statutes was again affirmed in the Pollard Case, decided by the Supreme Court in 1840. It involved the validity of a grant under the treaty of 1802 with France and the treaty of 1819 with Spain.

[5] 133 U. S. 258 (1889).

discourage or prevent by statute or constitutional provision the immigration of Chinese into those states, or after their arrival, to discriminate against them in various industries. Prior to the regulation of Chinese immigration by Congressional statutes, the Chinese were admitted on the basis of treaty provisions granting the reciprocal rights of immigration, travel and daily pursuit of business and labor to American citizens in China and Chinese subjects in the United States.[6] Conditions arose which were highly distasteful to the Pacific States, and there were numerous instances of anti-alien legislation based upon their police powers and in contravention of the federal treaties.

The case of *Baker* v. *City of Portland*[7] involved a statute of the state of Oregon prohibiting the employment of Chinese laborers on public works. An attempt was made under this statute to enjoin a contractor from employing Chinese labor. Judge DEADY of the United States District Court held that the United States court had jurisdiction under the treaties of 1858 and 1868 with China; that until abrogated or modified these treaties were the supreme law of the land, with which no state or municipal corporation could interfere.

In California, the anti-Chinese agitation was carried further. The constitution adopted in 1879 prohibited corporations from employing Chinese labor and authorized the enactment of all legislation necessary to enforce the provision. Accordingly, statutes were passed making such employment a misdemeanor. One Firburcio PARROTT was arrested for violating one of these statutes. He sued out a writ of habeas corpus in the United States District Court on the ground that the provisions of the state constitution and act passed thereunder were void because they conflicted with the treaty of 1868 with China. In this case, *In re Firburcio Parrott*,[8] Justice SAWYER declared that the states had surrendered the treaty-making power to the general government, and when duly exercised by the President and Senate the resulting treaty was the supreme law of the land, to which not only state laws, but state constitutions were in express terms subordinated.

A similar principle is involved in the case of municipal ordinances in conflict with treaty stipulations, and while interest centres at present chiefly in instances of state violation of treaty obligations, a few examples of questioned local interference may be included.

[6] Treaties of 1844, 1858, 1868; Fed. Stat. Ann. VII, pp. 646-480.
[7] Sawy. 566 (1879).
[8] 6 Sawy. 349.

The case of *United States* v. *Iuong Woo*,[9] involved an ordinance of San Francisco which made it unlawful to establish and carry on laundries within certain limits without obtaining the consent of the Board of Supervisors. This consent was to be based upon the recommendations of not less than twelve citizens and tax-payers in the block in which the laundry was to be established. The local regulation was considered repugnant to the treaty provisions and declared void.

There were cases, however, in which municipal ordinances were sustained, and of these *Soon Hing* v. *Crowley* [10] is an example. Another ordinance of San Francisco was involved, imposing certain regulations and restrictions upon laundries and ostensibly aiming against the Chinese. In his opinion Justice FIELD conceded that the regulation of laundries was a matter which came within the right of the municipality and the Federal Government could not, in its treaty stipulations as to the rights of aliens to live and labor, infringe upon municipal jurisdiction. "When the general security and welfare require that a particular kind of work should be done at certain times or hours, and an ordinance is made to that effect, a person engaged in performing that sort of work has no inherent right to pursue his occupation during the prohibited time."

The complaint was made by the Chinese that this ordinance was aimed exclusively at them. To this assertion the court replied that there was nothing in the language of that ordinance or in the record of its enactment to support that claim. The court declared itself unable "to inquire into the motives of legislators in enacting laws, except as they may be disclosed on the face of the act or be inferable from their operation, considered with reference to the condition of the country and existing legislation." This regulation was upheld as a legitimate police ordinance, and as such it was not annulled by the treaty provisions.

The cases cited above have been adjudicated in the federal courts. There are, however, a large number of cases involving a conflict of state statutes with federal treaties which have been decided in state courts with admirable impartiality.

In *Cornet* v. *Winton*,[11] the Supreme Court of Tennessee decided in favor of the supremacy of treaties over all state laws. In one of the opinions the following passage occurred: "Must the whole Union because of the misconduct of one state be forced into a war? Shall

[9] 13 Fed. 229; 7 Sawy. 526 (1882).
[10] 113 U. S. 703 (1885).
[11] 2 Yerger, 143 (1826).

it be allowed the state legislature by their acts to oppose and prevent the executing of a treaty in which the whole Union is interested? The treaty should also be a law, operating immediately and directly upon the people. If the state legislatures must be applied to, to pass laws for the execution of treaties which are in any respect burdensome, they will never do it. Congress applied to the state legislatures to pass laws for the execution of the fourth article in the Treaty of Peace from 1783 to 1787, and no law was ever made for the purpose. The United States would have been involved in war had it not been for the formation of the Federal Constitution and the declaration contained therein, that treaties should be the supreme law, above all laws and obstructions which could stand in the way."

In the case of *Maiden* v. *Ingersoll*,[12] Justice CAMPBELL of the Supreme Court of Michigan held that "when a treaty has been made by proper federal authorities and ratified, it becomes the law of the land." With reference to the rights claimed by the Indians as plaintiffs, he declared that "when territorial rights are, by treaty, recognized as having existed in one tribe, we are bound to regard it."

More recently the Supreme Court of New York was called upon to decide a case of conflict. The defendant in *People* v. *Warren*,[13] was charged with employing Italians on city work in Buffalo, and thus violating a state statute which made it a crime for anyone contracting with a municipal corporation to employ aliens as laborers upon work done under contract. The court held that the act was unconstitutional as to both the federal and state constitutions and also repugnant to the treaty of 1871 with the King of Italy. This provided in substance that resident Italians in the United States should enjoy the same rights and privileges in respect to their persons and property as are secured to our citizens, and in the last category is impliedly included the right to labor.

The several cases cited above are sufficient to show that state courts have frequently felt the binding authority of federal treaties and have acted in accordance with Article VI of the Constitution. There are, on the other hand, numerous instances when state tribunals have refused to construe a treaty in such a way as to render a state statute inoperative. These cases are relatively frequent in California, and the following apparent judicial inconsistency clearly indicates that the attitude of the state is due in great part to the presence of a large number of Asiatics within its boundaries.

[12] 6 Mich. 373 (1859).
[13] Misc. Rep. 615 (1895).

In the case of *People v. Naglee*,[14] the Supreme Court of California laid down the rule, which it attempted to support by decisions of the Supreme Court of the United States,[15] that "a treaty is supreme only when it does not transcend certain limits, and that it cannot supersede a state law which enforces or exercises any part of the state power not granted away by the Constitution." The obvious reference made here was to the police powers of the states, constituting the most important and far-reaching of the "reserved rights." Five years later a case[16] arose which involved a statute of California conflicting with the Prussian treaty of 1828[17] confirming Prussian citizens in America in their enjoyment of full rights of inheritance. The opinion contained the following strong defense of the supremacy of treaty stipulations:

"The treaty-making power of the Federal Government must, from necessity, be sufficiently ample to cover all the usual subjects of treaties between different powers. If we were to deny to the treaty-making power of our government the exercise of jurisdiction over the property of deceased aliens upon the ground of interference with the course of descents, or the laws of distribution of a state where property may exist, by parity of reasoning we should not make commercial treaties with foreign nations because, it might be said, some of their provisions would injure the business of a portion of the citizens of one of the states of the Union. If the treaty-making power which resides in the Federal Government is not sufficient to permit it to arrange with a foreign nation the distribution of an alien's property, then that power resides nowhere, since it is denied to the states."

It may be said that the tendency of state courts as a rule has been one of impartiality in attitude towards their state statutes and federal treaties. It is only natural, however, that in those states which have encountered particular problems of immigration, public sentiment should be influenced by the conditions that prevailed. Accordingly California has shown a rather persistent tendency to construe her laws favorably, and this is not wholly a cause for condemnation. During the years of the great influx of Chinese immigration before Congress undertook to deal with the problem the state naturally assumed the initiative in the matter, and the habit of self-help has continued in some measure to the present time. The last manifes-

[14] 1 Cal. 232 (1850).
[15] Passenger Cases, 7 How. 283; License Cases, 5 How. 504, 588.
[16] People v. Gerbe, 5 Cal. 381 (1855).
[17] Federal Statutes Annotated, Vol. VII, p. 770, Art. XIV.

tation of the persistence of this habit gave occasion to the present embarrassing situation.

Not all cases of conflict have been adjudicated, as it was said, by the courts of the country. Both federal and state tribunals have done much in clearing up difficulties and adjusting conflicting views when the disputes have reached the status of definite issues for trial. But some of the most interesting situations have arisen which never came before a court for adjudication, and these controversies have often centered about criminal as well as civil offenses. The following discussion of foreign conplications includes contentions arising not only from legislation of the states, but also from other acts of the states or acts of citizens for which the states took all responsibility. There have been a number of instances of mob violence and injury to aliens or unnaturalized inhabitants in the states for which the foreign governments considered the United States responsible. These are of interest in the present study only so far as they violated treaty stipulations with the foreign government whose citizens and subjects suffered injustice.

The most important case of criminal violation of treaty provisions by states directly or indirectly was that of the Mafia Riots in New Orleans, March 14, 1891. Several actual and attempted assassinations occurred supposedly through the action of a secret Italian society known as the "Mafia," ending in the murder of the Chief of Police of New Orleans, D. C. HENNESSY. A trial of several of the assassins, all of whom were Italians, and a part of them naturalized, resulted in an acquittal of all of them, due probably in part to jury-fixing and in part to fear on the part of the jurors of their own assassination. After the trial a secret meeting was held and a plan deliberately formed for an attack on the jail. It was successfully carried out on March 14, 1891, when eleven Italians charged with the murder were seized and hanged. The Grand Jury afterwards reported that the party of avenging citizens embraced many of the most law-abiding and respected element of the city, and that "the act seemed to involve the entire people of the parish and city of New Orleans."

The affair was reported immediately by the Italian Consul to the Italian Minister at Washington. The latter was instructed by the Italian Minister of Foreign Affairs to request the protection of the Italians in New Orleans, and to demand the punishment of those concerned in the attack. In pursuance of these instructions the Italian Minister brought the affair officially to the atten-

tion of the Secretary of State, Mr. BLAINE, who telegraphed the Governor of Louisiana the provisions of the treaty of 1871,[13] which had been violated. Article III provided that "the citizens of each of the High Contracting Parties shall have in the states and territories of the other the most constant protection and security for their persons and property, and shall enjoy in this respect the same rights and privileges as are accorded the natives, on their submitting themselves to the conditions imposed upon the natives."

The event occasioned great excitement in Italy, and the Marquis DI RUDINI, at that time Premier, being threatened with a serious ministerial crisis, made very exacting demands upon the government of the United States. He not only asked the official assurance by the United States that the guilty parties should be brought to trial, but that it should be recognized in principle that an indemnity was due the relatives of the victims.

In substance Mr. BLAINE replied that the punishment of the murderers must be left to the local tribunals in the first instance and if they would not comply with the procedure locally prescribed, it would then be the duty of the United States to consider some other form of redress. Mr. BLAINE declared that Italy must look to the local government for the punishment of the offenders, since the President could not interfere in the course of justice even if natives were the aggrieved parties.

This position was somewhat different from the policy of the government towards the United States of Colombia when circumstances were reversed in 1871. April 6, twenty years previous to the Mafia Riots, the steamer "Montijo," owned by citizens of the United States, while on a voyage to Panama, was seized and burned by persons engaged in revolution in Colombia. The event occurred in waters within the jurisdiction of the state of Panama, and the United States of Colombia sought to escape liability on these grounds. The controversy was finally submitted to arbitration, and the decision rendered by the umpire, July 25, 1875, was in favor of the complainants, citizens of the United States of America, and exactly coincided with our views in the matter. We maintained the liability of the general government for every international wrong committed by a state, and declared that "since a state has no entity in international relations, the general government is bound to be responsible to foreign nations and to show in every case that it has done its best to obtain satisfaction from the aggressor."

[13] Fed. St. Annotated, Vol. VII, p. 656, Art. III.

As our government refused to make any reparation in the matter, Italy recalled its minister and after the withdrawal of Baron FARA, the American Minister, Mr. PORTER, withdrew from Rome. The Marquis DI RUDINI, in referring to the position of our government in the matter said:

"We are under the sad necessity of concluding that what to every other government would be the accomplishment of simple duty is impossible to the Federal Government of the United States. We have affirmed, and we again affirm our right. Let the Federal Government reflect upon its side if it is expedient to leave to the mercy of each state of the Union,irresponsible to foreign countries, the efficiency of treaties pledging its faith and honor to nations."

The controversy was ended when Mr. BLAINE tendered to the Minister of Foreign Affairs of Italy 125,000 francs[19] in a note stating that "while the injury was not inflicted directly by the United States, still in the opinion of the President it was the solemn duty as well as the great pleasure of the National Government to pay a satisfactory indemnity." The Marquis IMPERIALI, Italian Minister of Foreign Affairs, accepted the indemnity and diplomatic relations were resumed.

The recent instance of conflict between state laws and treaty stipulations in the Japanese School Question of 1906 involved the anti-alien sentiment of California in a way similar to the present controversy. Since 1885 the statutes of the state of California gave to local school boards the power of establishing separate schools for Indian children and children of Chinese descent. When such separate schools should be provided, the above classes of children should not be admitted to any other schools. Acting under authority of this act,[20] the Board of School Trustees of San Francisco adopted a resolution by which principals were directed "to send all Chinese, Japanese and Indian children to the Oriental Public School situated on the south side of Clay Street, between Powell and Mason Streets, on and after Monday, October 15, 1906."

The treaty with which the Japanese claimed this measure conflicted was that of 1894[21] which contained this provision:

"The citizens and subjects of each of the two High Contracting Parties shall have full liberty to enter, travel or reside in any part of the territories of the other Contracting Party, and shall enjoy full

[19] The tender of $24,330.90 was made April 12, 1892.

[20] Article X, § 1664 of the School Law of California.

[21] U. S. Stat. Vol. 29, p. 848; Fed. Stat. Ann. Vol. VII, p. —. The treaty was concluded Nov. 22, 1894, and proclaimed in effect, Mar. 21, 1895.

and perfect protection for their persons and property. In whatever relates to rights of residence and travel; to the possession of goods and effects of any kind, * * * the citizens or subjects of each Contracting Party shall enjoy in the territories of the other the same privileges, liberties and rights" as citizens of the most favored nation, excepting the right to become naturalized citizens. It is further provided in this treaty that these stipulations should not in any way affect the laws, ordinances and regulations with regard to trade, the immigration of laborers, police and public security which are in force or may hereafter be enacted in either of the two countries. It was the "most favored nation" clause above cited which Japan claimed had been violated by the act of the San Francisco School Board, since children of aliens who were citizens of other countries were allowed to attend the regular schools.

In construing the treaty the first question that presented itself was the extent of the rights included under the term "residence."[22] If the right of the Japanese to attend the public schools existed at all, it was necessarily founded upon the treaty rights of residence. There was no other right or privilege mentioned in the treaty which could be considered to include the right of attending the public schools. Apparently the phraseology of the treaty, liberal as it may be, scarcely extended the privilege of the public schools of a state to unnaturalized foreigners, and if the Federal Government had so intended, it was only natural to suppose that the treaty would have provided in express terms for schooling rights. The treaty carefully covered the rights of entry, travel, residence, disposition of property of all kinds, but nowhere were there provisions concerning school privileges. Such were the arguments of the state in behalf of the action of the School Board.

The United States, defending the position of the Japanese, insisted that if the state chose to supply education as a government function, it could not discriminate against alien children of any particular nation. Edwin MAXEY, the counsel for the Japanese Government in this controversy,[23] emphasized the obligations of the states to obey federal treaty stipulations. In the treaty under consideration the right of residence was declared by him to include the privilege of attendance at schools with native-born children. He

[22] For the difficulties and uncertainty attending the interpretation of the term "residence," see 34 Cyc. 1647 et seq.

[23] Yale Law Journal, XVI, pp. 90-03; Exclusion of the Japanese Children from Public Schools. His position is naturally one of strong defense of the Federal and Japanese point of views.

stated that in our treatment of European nations we had construed the right of residence thus broadly, and should we desire to except the Japanese from the regular operation of the treaty, it would be necessary, he affirmed, to modify the then-existing treaty by a Joint Conference with Japan.

However, a strong argument remained to the state of California both from the Constitution and from the treaty itself. By the former, the states are reserved the powers to protect the lives, health and property of their citizens and preserve good order and public morals.[24] By the treaty, itself, the laws, ordinances and regulations with regard to police and public security "which are in force or which may hereafter be enacted" were not to be affected.[25]

A phase of the question, which complicated the situation, was the assumption by the Federal Government of the power to grant to unnaturalized foreigners the right to attend the public schools of a state. The question arises whether the local public schools of a city maintained exclusively by local taxation presumably for the exclusive use of its citizens, are properly a subject of negotiation of the Federal Government with a foreign country.

For the purpose of enforcing what is considered the rights of the Japanese under the treaty, the United States filed a bill in equity in the Circuit Court of California in which it alleged that the acts of the school authorities in San Francisco constituted a violation of the treaty. The right to maintain such a proceeding was based upon the principles announced in the *Debs* Case[26] holding that a court of equity has jurisdiction to issue an injunction to aid the Federal Government to prevent a forcible obstruction of commerce and of the transportation of the mails.

A proceeding in mandamus was also brought by the father of a Japanese child who had been excluded from the regular schools in San Francisco, asking that a writ issue reinstating the child in the school which he had formerly attended. When the controversy was settled by the withdrawal of the resolution objected to, the suits were dismissed.

In February, 1907, Mayor SCHMITZ and several associates spent some days in Washington conferring with President ROOSEVELT and Secretary ROOT. It became evident in these conferences that some mode of excluding Japanese labor was necessary, since the feeling

[24] Art. X of the Amendments. Thorpe v. Rutland and Burlington Railroad Company, 27 Vt. 140; Thayer's Cases, I, 709.

[25] Cf. p. 582 ante.

[26] 153 U. S. 564.

against the great number of Japanese laborers was the real cause for the action countenanced and defended by the state of California. A satisfactory settlement was finally reached when it was agreed to admit Japanese children into the public school of San Francisco on condition that Japanese coolies be excluded from future entrance into the country.[27]. A treaty with more restricted rights to aliens was concluded with Japan four years later, and it has been in reference to this treaty that the present question of possible conflict of California's measure has arisen.

The present controversy has presented a unique situation whose constitutional and diplomatic intricacies can be discussed most satisfactorily by those who have dealt with the problem. When the state joined issue with the Federal authorities, two alternatives presented themselves to the State Department. It could consider the treaty violated in law as well as spirit, reprove the state for its obstinate refusal to repeal the legislation in question, and after all modify the existing treaty to harmonize with the California statute. Or, it could consider the treaty violated only in spirit, yield to the state, assume the responsibility for the act, and make its peace with the offended country. Either policy carried with it embarrassment to the Federal Government. The adoption of the latter alternative involved the State Department in a series of negotiations pending at present. The historical background of the controversy presenting similar though not identical cases both in and out of the courts, may serve to throw into clearer relief the complications of the recent problem.

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[27] Yale Law Journal, XVI, pp. 400-404. A compromise in the Japanese Controversy, again emphasizing the foreign point of view.